UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN THE MATTER OF:	:	CASE NUMBER: A03-61285-PWB
VALUE MUSIC CONCEPTS, INC., CENTRAL SOUTH MUSIC SALES, INC., KAR, INC., RECORD CENTRAL, INC., and MUSIC 4 LESS, INC.,	:	
Debtors.	:	IN PROCEEDINGS UNDER CHAPTER 11 OF THE BANKRUPTCY CODE
WILLIAM KAYE, AS CREDITOR REPRESENTATIVE FOR VALUE MUSIC CONCEPTS, INC., et al.,	:	
Plaintiff	:	ADVERSARY PROCEEDING NO. 04-6042
v.	:	
WORLD INTERNATIONAL TRADING, INC. d/b/a WIT ENTERTAINMENT,	:	JUDGE BONAPFEL
Defendant.	:	

ORDER DENYING MOTION TO VACATE DEFAULT JUDGEMENT AND SET ASIDE DEFAULT

On May 12, 2004, the Court entered default judgment against World International Trading, Inc. d/b/a WIT Entertainment ("WIT") in the amount of $211,314.00 on the Plaintiff's avoidance action brought pursuant to 11 U.S.C. §§ 547 and 550. Twenty-two months later, WIT filed a motion to vacate the default judgment and set aside the default pursuant to Rules 55(c) and 60(b)(6) of the Federal Rules of Civil Procedure (made applicable pursuant to Rules 7055 and 9024 of the Federal Rules of Bankruptcy Procedure) based upon "extraordinary circumstances" and for cause. Alternatively, WIT contends that the default judgment should be vacated because service of process upon WIT was improper. The Plaintiff vigorously opposes the motion. For the reasons

stated herein, WIT's motion to vacate the default judgment and set aside the default is denied.

WIT is a distributor of DVDs, video games, digital cameras, and accessories who sold DVDs to the Debtor for resale in its stores. Filippo Boccara is WIT's president, sole shareholder, sole director, and registered agent for service of process.

The Plaintiff filed the complaint initiating this adversary proceeding on February 6, 2004. On February 11, 2004, the Plaintiff served a copy of the complaint, summons, notice, and discovery requests by both regular mail and certified mail addressed as follows: "Filippo Boccara, 8305 N.W. 27th Street, Suite 101, Miami, FL 33122." (Plaintiff's Response, Exhibit A, Affidavit of James R. Sacca and Exhibit B, Certified Mail Receipt). This is the address listed for WIT on the website maintained by the Florida Department of State, Division of Corporations. *Id*. The certified mail envelope containing the above-referenced documents was signed for on February 13, 2004, by "M. Correa" at WIT's offices. Mr. Boccara confirms that this signature belongs to WIT's former receptionist, but avers that she was not authorized to accept or sign for certified mail or to open mail addressed to Mr. Boccara. (WIT's Motion to Vacate, Exhibit 1, Affidavit of Filippo Boccara, "Boccara Affidavit," ¶¶ 5,6,8).

WIT failed to timely file an answer to the complaint. On April 12, 2004, the Plaintiff filed a request for entry of default. WIT's default was entered on April 16, 2004, a copy of which was served by first class mail on April 18, 2004, on "World International Trading, Inc. d/b/a WIT Entert, c/o Filipppo Boccara, 8305 N.W. 27th Street, Suite 101, Miami, FL 33122." (Doc. No. 8). On April 23, 2004, the Plaintiff filed a motion for default judgment which was also served upon "Filippo Boccara, 8305 N.W. 27th Street, Suite 101, Miami, FL 33122." On May 12, 2004, the Court entered an Order granting the Plaintiff's motion for default judgment and entered default judgment against WIT in the amount of $211,314. The Order and Default Judgment were served

upon "World International Trading, Inc. d/b/a WIT Entertainment, c/o Filippo Boccara, 8305 N.W. 27th Street, Suite 101, Miami, FL 33122." (Doc. Nos. 10-13).

WIT states that, from March 6 through April 25, 2004, Fiippo Boccara, WIT's president, was in France because his father, who lives in France, suffered a major stroke and he traveled there to care for his father and comfort his mother and siblings; Mr. Boccara spent each day with his father in the hospital. During this time, the answer was due and default was entered. As a result of caring for his father and family, Boccara had little to no communication with his office in Miami or any of his employees. (Boccara Affidavit, ¶¶ 9-11). During his absence, Boccara's then controller, Bertha Diaz, assumed most of his duties and obligations in addition to her own. (Boccara Affidavit, ¶ 9). Boccara returned to Miami at the end of April 2004 and discovered WIT's office in "disarray" due to his absence. (Boccara Affidavit, ¶ 13). Upon his return he focused on recovering critical operational issues at WIT, while still worrying about his father's condition and serving as the decision maker for a family business located in France. (Boccara Affidavit, ¶ 13).

Sadly, Boccara's father died in January 2005. During the course of his illness and after his death, Boccara was in France during June, July, August, October and December of 2004, and January, February, March and July of 2005. (Boccara Affidavit, ¶ 14).

After obtaining a certification of judgment and registering the judgment in the U.S. Bankruptcy Court in the Southern District of Florida (assigned case number 04-80007), the Plaintiff filed a motion for writ of garnishment against WIT in the Florida proceeding which the Plaintiff states was served on WIT through Boccara at WIT's headquarters, as well as International Bancorp of Miami, Inc., where WIT was believed to have deposits. (Plaintiff's Response, Exhibit C, Affidavit of John Elrod, ¶ 3). On February 16, 2006, the Bankruptcy Court for the Southern

District of Florida served a writ of garnishment on International Bancorp of Miami, Inc., and WIT, through Boccara, via U.S. mail. Mr. Boccara states that he first learned of this adversary proceeding on February 17, 2006 when WIT's bank officer at International Bancorp of Miami told Mr. Boccara that WIT's account had been garnished for over $200,000. (Boccara Affidavit, ¶ 15). Mr. Boccara's attorney in Miami contacted the Plaintiff's counsel and obtained the documents related to the adversary proceeding on February 28, 2006. Mr. Boccara states that neither he nor WIT's controller, the only other employee authorized to accept and sign for certified mail, ever received, accepted or signed for certified mail related to this adversary proceeding and that when his counsel obtained the documents on February 28, 2006, this was the first time any "representative of WIT" had seen any document related to the adversary proceeding, other than the writ of garnishment. (Boccara Affidavit, ¶ 16, Motion to Vacate at 7).

WIT seeks to vacate the default judgment on two grounds. WIT argues that the default should be set aside and the judgment vacated because the Plaintiff did not properly serve the summons and complaint as required by Bankruptcy Rule 7004(b)(3). Alternatively, WIT argues that the default should be set aside and the judgment vacated pursuant to Rule 60(b)(6) based on the extenuating circumstances and hardship which led Mr. Boccara to be away from WIT's offices.

Service of Process

WIT contends that service of the summons and complaint was improper because it did not comport with the requirements of due process. Specifically, WIT contends that (1) the Plaintiff did not direct the documents to the corporation WIT and a named officer of the corporation and that the address on the envelope did not include the name of the corporation "World International Trading, Inc." or any other reference that would indicate that it was directed to Boccara in his capacity as an officer or agent of WIT; and (2) Mr. Boccara never personally received the summons

and complaint. If service of process was improper, this would constitute cause for vacating the default and judgment pursuant to Rule 60(b)(4) because it would be void for lack of personal jurisdiction.

Bankruptcy Rule 7004(b)(3) permits service by first class mail postage prepaid as follows:

> Upon a domestic or foreign corporation or upon a partnership or other unincorporated association, by mailing a copy of the summons and complaint to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process.

Due process requires notice that is "reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections." *Mullane v.Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). The Court concludes that the Plaintiff's service of the summons and complaint upon WIT meets the requirements of Rule 7004(b)(3) and satisfies the constitutional requirements of due process.

The Plaintiff served its summons and complaint by certified mail and regular mail in envelopes addressed to "Filippo Boccara, 8305 N.W. 27th Street, Suite 101, Miami, FL 33122." Mr. Boccara is the president, sole owner, sole director and registered agent for service of process for WIT. (Boccara Affidavit, ¶ 2). The address on the envelopes is WIT's headquarters. As such, the envelopes were mailed to the "attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process" as required by Rule 7004(b)(3). Unlike *In re Faulknor*, 2005 WL 102970 (Bankr. N.D. Ga. 2005), where this Court found service upon an unnamed officer did not meet the requirements of due process because the movant had served the office, not the officer, service here was directed to the named officer at the

company's office. *Faulknor*, *supra* (*citing In re Schoon*, 153 B.R. 48, 49 (Bankr. N.D. Cal. 1993)). Thus, the Plaintiff served the named officer, not the office, which is what Bankruptcy Rule 7004(b)(3) requires.

WIT contends, however, that the lack of reference to the corporate name in the address makes this service defective because it may have caused confusion in WIT's office that prevented a proper officer from receiving it. In this regard, WIT explains, "The receptionist could have easily thought the package in question was a personal item for Boccara, rather than belonging to WIT, and thus instead of following proper WIT procedure and delivering the certified mail to WIT's Controller, Ms. Diaz, did something else with it that resulted in it never being received by WIT's Controller or Boccara, the only two people authorized to deal with and handle such certified mail." (Motion to Vacate at 15). This explanation, however, contradicts Mr. Boccara's own affidavit that shows he should have gotten a copy under any circumstances.

According to Mr. Boccara's affidavit, he and Bertha Diaz, the controller, were the only WIT employees authorized to accept or sign for certified mail. Further, he avers, the only persons authorized to open regular mail addressed to Mr. Boccara are Mr. Boccara himself or the controller. Mr. Boccara states, " The receptionist collected ordinary mail delivery from a mailbox in front of WIT's office. Envelope deliveries from the United States Postal Service were distributed by the receptionist to the addressees. Any envelopes addressed to me were and are brought to either myself or my Controller." (Boccara Affidavit, ¶ 7).

The fact that WIT's receptionist disregarded internal procedures regarding the receipt of certified mail is not a basis for finding *service* defective. Moreover, the procedures would have resulted in delivery of the regular mail to Mr. Boccara, which is all that Rule 7004(b)(3) requires. According to Mr. Boccara's affidavit, any regular mail delivered by the postal service was

distributed by the receptionist to the addressee. Presumably then, whether the envelope had been addressed only to "Filippo Boccara" or to "World International Trading, Inc., Attn: Filippo Boccara," the result would have been the same. The envelope would have been delivered by the receptionist to Mr. Boccara, the addressee, or the controller. Mr. Boccara does not allege that there was a separate protocol for presumed "personal" mail as opposed to business mail.

It is also important to note that service of the complaint and summons occurred in February, *before* the onset of the father's stroke in March. Thus, at the time of delivery, Mr. Boccara was not out of the country, so presumably he was receiving his mail pursuant to the procedures established by him.

WIT contends that because Mr. Boccara did not actually receive the summons and complaint, service was defective and the default should be set aside and the judgment vacated. (Boccara Affidavit, ¶ 16). But the Plaintiff need not prove Mr. Boccara's actual receipt to establish proper service. It is undisputed that the Plaintiff mailed a copy of the summons and complaint by certified mail and regular, U.S. mail to a proper officer at a proper address. It is also undisputed that an employee of WIT signed for and received the certified mail. The fact that she was not authorized to sign for certified mail and did so is not relevant to the court's inquiry as to whether the Plaintiff's *service* was proper. The failure of WIT to observe internal procedures or protocol for the receipt of certified mail is not relevant to whether the Plaintiff served the summons and complaint in compliance with Bankruptcy Rule 7004(b)(3).

Moreover, even if an unauthorized individual signed for the certified mail, there was the separate delivery of the summons and complaint by regular, U.S. Mail. The "mailbox presumption" is a common law evidentiary principle that permits a party to prove receipt of a paper that has been properly mailed. The Supreme Court stated the rule in *Rosenthal v. Walker*, 111 U.S. 185, 193

(1884):

> The rule is well settled that if a letter properly directed is proved to have been either put into the post-office or delivered to the postman, it is presumed, from the known course of business in the post-office department, that it reached its destination at the regular time, and was received by the person to whom it was addressed.

Under the mailbox presumption, the undisputed mailing of the summons and complaint establishes a rebuttable presumption that Mr. Boccara received it. Mr. Boccara has offered no evidence other than his own affidavit to rebut the presumption. But the circumstances described in the affidavit are so inconsistent with this assertion they do not rebut the presumption. In particular, the procedure was for regular mail to be directed to Mr. Boccara or the controller, and the contemporaneously mailed certified envelope was indisputably delivered to the office and received. In short, process got where it was supposed to go. In contrast, other undisputed facts are consistent with the presumption. For example, the envelope containing the summons and complaint was not returned as undeliverable. And, none of the later documents mailed to WIT by the Plaintiff or the Clerk of Court were returned as undeliverable.

In summary, the Court is satisfied that service of process was effective and due process requirements were met without regard to whether Mr. Boccara himself personally received it. The Plaintiff complied with the requirements of Rule 7004(b)(3). The facts here show that WIT received sufficient notice of the pendency of this action to meet due process requirements. The failure of WIT's internal procedures to direct either of the envelopes to Mr. Boccara may be material to a request for relief from the judgment under Rule 60(b), but not to the validity of service. The Court concludes, therefore, that summons and a copy of the complaint were served

on WIT in accordance with the requirements of Rule 7004(b)(3) and due process.

Rule 60(b)

Rule 55(c) of the Federal Rules of Civil Procedure, made applicable by Rule 7055 of the Federal Rules of Bankruptcy Procedure, provides, "For good cause shown the court may set aside an entry of default . . . ." The Eleventh Circuit has held that the "good cause" standard is a "mutable standard, varying from situation to situation" and a "liberal one." *Compania Interamericana Export-Import, S.A. v. Compania Dominicana de Aviacion*, 88 F.3d 948, 951 (11th Cir. 1996). In determining whether good cause exists to set aside an entry of default, courts have considered "whether the default was culpable or willful, whether setting it aside would prejudice the adversary, and whether the defaulting party presents a meritorious defense." *Id*. (citations omitted). Other factors include "whether the defaulting party acted promptly to correct the default." *Id*. In addition, in making the determination of whether good cause exists to set aside an entry of default, courts are mindful of the fact that "defaults are not favored in federal court and trials on the merits are the preferred method for resolving disputes." *Ritts v. Dealers Alliance Credit Corp*., 989 F.Supp. 1475, 1480 (N.D. Ga. 1997).

However, in this case, there has been entry of default judgment, not merely entry of default. As a result, the issue is whether WIT has set forth grounds under Rule 60(b) for obtaining relief from the default judgment. *See* FED. R. CIV. P. 55(c) (For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).”). Rule 60(b) provides:

> On motion and upon such terms as are just, the court may relieve a party or a party’s legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged, or a prior judgment on which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or

(6) any other reason justifying relief from the operation of the judgment.

Rule 60(b) further provides that a motion for relief from a judgment "shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken."

A common avenue for relief from judgment is mistake, inadvertence, or excusable neglect under Rule 60(b)(1), whereby a party must establish that "(1) it had a meritorious defense that might have affected the outcome; (2) granting the motion would not result in prejudice to the non-defaulting party; and (3) a good reason existed for failing to reply to the complaint." *Feltman v. Valdez (In re Worldwide Web Systems, Inc.)*, 328 F.3d 1291, 1295 (11th Cir. 2003).

Mr. Boccara, as president of WIT, asserts that the reasons for the failure to reply to the complaint were the unusual and grave circumstances of a family crisis which led him to be out of the country and away from his business for an extended period of time with little time or ability to focus on his business or anything else except his family. He contends that this crisis, coupled with

his lack of personal knowledge of the adversary proceeding and the contention that WIT has a meritorious defense, warrant setting aside the default and judgment under Rule 60(b).

These reasons are properly characterized as "excusable neglect." Mr. Boccara's failure to monitor WIT's ongoing daily business during the time of his father's illness and his extended absence from WIT and the failure of WIT's employees to provide him with the documents delivered to WIT's headquarters constitute neglect. The circumstances giving rise to Boccara's absence, namely the debilitating and extended convalescence and ultimate death of his father overseas, are circumstances that this Court could find constitute neglect. But relief based on "excusable neglect" is governed by Rule 60(b)(1), and this basis for vacating a judgment is available only within one year after the judgment is entered. Because WIT's motion is brought twenty-two months after entry of judgment, WIT's only avenue for relief is Rule 60(b)(6).

The relief available under Rule 60(b)(6) is limited. The Supreme Court has held that Rule 60(b)(1) and Rule 60(b)(6) are mutually exclusive. *Pioneer Investment Servs. Co. v. Brunswick Assoc. Limited Partnership*, 507 U.S. 380 (1993). Because they are mutually exclusive, "a party who failed to take timely action due to 'excusable neglect' may not seek relief more than a year after the judgment by resorting to subsection (6). To justify relief under subsection (6), a party must show 'extraordinary circumstances' suggesting that the party is faultless in the delay." *Id*. at 393 (*citing Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 863 and n.11 (1988)); *see Solaroll Shade and Shutter Corp. v. Bio-Energy Systems, Inc.*, 803 F.2d 1130, 1133 (11th Cir. 1986) (citations omitted) (The Eleventh Circuit has observed that it "consistently has held that 60(b)(1) and (b)(6) are mutually exclusive. Therefore, a court cannot grant relief under (b)(6) for any reason which the court could consider under (b)(1)."). As a result, if the reasons for vacating a judgment amount to "excusable neglect" and relief on such grounds is time-barred, Rule

60(b)(6) does not afford a remedy. A Rule 60(b)(6) motion is meant "only for extraordinary circumstances." *Toole v. Baxter Healthcare Corp.*, 235 F.3d 1307. 1316 (11th Cir. 2000).

WIT contends that its situation falls within "extraordinary circumstances" because Mr. Boccara's failure to act was not due to "neglect," but instead due to circumstances beyond his control. In *Pioneer*, the Supreme Court characterized neglect as "to give little attention or respect to a matter" or "to leave undone or unattended to esp[ecially] through carelessness" and stated that ultimately the word "encompasses both simple, faultless omissions to act and, more commonly, omissions caused by carelessness." *Pioneer*, 507 U.S. at 388.

The Court concludes that WIT has not met this higher burden of "extraordinary circumstances." WIT's basis for relief lies within excusable neglect because the failure to respond was "neglect" in the sense that Boccara was neglectful or inattentive to WIT's operations in order to focus, understandably, on his father's illness. However, his inattention to WIT was not a circumstance beyond his control; it was a choice (albeit, a sudden and difficult one) to shift his focus to personal matters and away from business operations.

This does not establish extraordinary circumstances which are more than excusable neglect. In this regard, it is critical that Mr. Boccara was in fact in Miami at the time the complaint and summons were served and during much of the 30 day answer time. The summons and complaint were served on February 11, 2004, and the certified mail was signed for on February 13, 2004. WIT's answer was due on March 10, 2004. Mr. Boccara did not leave the country until March 6, 2004. If Mr. Boccara did not actually receive either of the two envelopes because an employee of WIT did not properly deliver them to Mr. Boccara, the president and registered agent of WIT, it is because of a failure of internal procedures. Although this may be excusable neglect, it does not satisfy the requirements of extraordinary circumstances.

The fact that the Plaintiff and the Clerk's office mailed further documents relating to this matter provides further grounds for denying relief sought 22 months after entry of judgment. WIT must be charged with notice at some point before a year after entry of judgment that this adversary proceeding was pending. Yet it failed to take any action within that time. As such, it is not "faultless" with regard to the delay.

In conclusion, the Court finds that service of the summons and complaint complied with the requirements of due process and that WIT has failed to set forth extraordinary circumstances to warrant setting aside the default and vacating the default judgment entered on May 12, 2004. It is

ORDERED that WIT's motion to set aside default and vacate default judgment is denied.

The Clerk is directed to serve copies of this Order on the persons on the attached Distribution List.

At Atlanta, Georgia, this _____ day of October, 2006.

PAUL W. BONAPFEL
UNITED STATES BANKRUPTCY JUDGE

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